

REMARKS/ARGUMENTS

Favorable reconsideration of this application is requested in view of the above amendments and in light of the following remarks and discussion.

Claims 1-26 are pending. Claims 1-6 and 15-17 are withdrawn. Claims 1-20 are amended. Claims 21-26 are newly added. Support for newly added Claims 21-25 can be found in original Claims 10, 13, and 18, for example inasmuch as these claims are added to remove multiple dependencies. Support for newly added Claim 26 can be found in original Claims 1 and 7 and in the published application in numbered paragraph [0027], for example. Support for the amendment to Claim 7 can be found in the published application in numbered paragraph [0027], for example. Support for the amendments to the remaining claims is self-evident inasmuch as these claims are amended to address informalities and/or remove reference numbers. No new matter is added.

In the outstanding Office Action, Claims 10, 13, 14, 19, and 20 were rejected under 35 U.S.C. § 112, second paragraph, as indefinite. Claims 7-9 were rejected under 35 U.S.C. § 102(b) as anticipated by Bardin et al. (European Patent No. EP 1243210, herein "Bardin"). Claims 10-14 were rejected under 35 U.S.C. § 103(a) as obvious over Bardin. Claims 10-20 were rejected under 35 U.S.C. § 103(a) as obvious over Bardin in view of Fond (U.S. Patent No. 5,242,702, herein "Fond").

Regarding the rejection of Claims 10, 13, and 14 as indefinite, Claims 10, 13, and 14 are amended to recite "said dispensing wall lid portion." Accordingly, the language suggested on page 2 of the outstanding Office Action has been incorporated into these claims, and Applicant respectfully submits that the rejection of Claims 10, 13, and 14 as indefinite is overcome.

Regarding the rejection of Claim 19, the term "spaced" is further clarified via an amendment to Claim 19 specifying that the filter element is "spaced apart from a bottom wall

of said capsule via a spacer.” Thus, there is no need to specify a requisite degree of spacing, and the rejection of Claim 19 as indefinite is overcome.

Regarding the rejection of Claim 20 as indefinite, Claim 20 is amended in accordance with Fig. 7 of the present application and the description thereof. Thus, the dispensing wall moves outwardly relative to an interior of the capsule. Accordingly, Applicant respectfully submits that amended Claim 20 is not indefinite.

Regarding the rejection of Claims 7-9 as anticipated by Bardin, that rejection is respectfully traversed by the present response.

Amended independent Claim 7 recites, in part:

a dispensing wall and a dispensing wall lid portion which opens to form a dispensing opening for said beverage,
wherein said capsule includes means for varying an area of said dispensing opening **at least twice during dispensing the beverage** from said capsule.

Thus, the capsule varies an area of the dispensing opening at least twice during dispensing a beverage from the capsule.

By way of review, the apparatus recited in Claim 7 relates to a capsule for beverages. When the beverage is coffee, hot water is typically fed to the capsule to brew the coffee. In the above-noted arrangement, the outlet through which the beverage is dispensed changes its area at least twice during dispensing.

One benefit of this arrangement is that foam is typically more effectively generated due to the repeated change in area of the opening, i.e., a sinusoidal-like wave of flow from the opening may be created, and a more pleasing product may be provided to the consumer of the beverage.

In contrast, Bardin does not disclose that an area of its dispensing opening changes in area **at least twice** during dispensing of a beverage. The outstanding Office Action asserts, on page 3, that the folding portion (23) will **inherently** function to impart an oscillating

movement to the wall during the dispensing step. However, "The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic." MPEP § 2112, In re Rijckaert, 9 F.3d 1531, 1534, 28 U.S.P.Q.2d 1955, 1957 (Fed. Cir. 1993). Moreover:

to establish inherency, the extrinsic evidence "must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient."

In re Robertson, 169 F.3d 743, 745, 49 U.S.P.Q.2d 1949, 1950-51 (Fed. Cir. 1999). Thus, the mere possibility that the structure described in Bardin oscillates does not mean that this feature is inherent.

In this regard, Applicant respectfully notes that not only is Bardin silent regarding the above-noted feature, the folding portion (23) does not necessarily impart an oscillating movement. In fact, Bardin actually **teaches away from such movement**.

In this regard, Bardin states:

[0022] The body 11 of the capsule is preferably constituted of a pressure resistant but elastically deformable material such as a thin, semi-rigid plastic material. More particularly, the second surface or bottom side 17 of the capsule should be able to withstand an inside pressure of several bars ; i. e., 1.5 to 15 bars, preferable 2-6 bars, while being capable of expanding outwardly as a response to such building-up of pressure. For that, the capsule may be made of plastic such as PP and PE or any other suitable foodgrade and heat and pressure resistant polymer material having a thickness of between 0.25 to 2 mm. As illustrated in Fig. 2 to 3A, the bottom side comprises an opening member 20. The opening member includes a continuous precut line 21 which traverses the thickness "t" of the bottom side. The precut line 21 is preferably a portion of circle although its geometry is not limiting but may also encompass a large choice of other possible shapes. Folding means 22 is further provided which is arranged with the precut line so that the opening member is capable of folding inwardly along a privileged folding line. For that, the folding means may preferably be a single foldable portion 23 located between both ends of the precut line 21. **The**

foldable portion is preferably non-recovering in the sense that when submitted to a flexure, the opening member does not recover its initial position of before the flexure. This important aspect ensures that when the pressure in the capsule starts decreasing due to the release effect, the opening remains open and the beverage can be fully dispensed.¹

Bardin additionally states:

[0031] As shown by Fig. 5, pressurized hot water enters the capsule through the two small holes 14, 15 of the lid and mix with the powder inside the capsule. As more water enters the capsule, the inside pressure starts building up so causing the body of the capsule, and more particularly, its bottom side, to deform outwardly. As the bottom deforms, the distance between the plunger and the capsule starts lessening until the opening member 20 of the capsule comes into abutting contact with the pressure surface 41 of the plunger as shown in Fig. 5. The capsule keeps deforming outwards till the pressure surface of the plunger starts applying a reaction force to the inside pressure. Such reaction force as gradually increasing acts on the opening member which flexes along its folding portion 23 (Fig. 6 and 8). As shown by Fig. 8 and 8A, in its periphery, the bulged surface 40 is adapted to substantially fit the peripheral contour or demarcation line 26 of the opening as the surface of the capsule deforms outwards while pushing the opening member in the center of the surface. As the opening member moves inwards, the liquid mixture which has reached a desired pressure inside is released through the radial channels 42 provided on the pressure surface. The pressure that releases after exiting the channels generates foams and the pressure inside the capsule stabilized (Fig. 6). At the end of the dispensing, the water stops entering the capsule and the plunger separates from the capsule as the **capsule** substantially or partially recovers its initial dimension due to the release of inside pressure. **As the opening member has the ability to remain open, the beverage remaining inside the capsule can be fully discharged to the outlet.²**

Thus, Bardin intends for the folding portion (23) to remain open while it is the capsule itself that recovers its initial dimension. When reading the above-quoted text from Bardin, a person of ordinary skill in the art would have been dissuaded from providing structure that changes an area of the opening at least twice during dispensing. Accordingly, not only is it

¹ Bardin, numbered paragraph [0022] (emphasis added).

² Bardin, numbered paragraph [0031] (emphasis added).

not inherent that the folding portion (23) of Bardin will impart an oscillating movement, Bardin intends for the folding portion to stay in the open position, and therefore, does not provide any oscillating motion inasmuch as this would tend to undesirably close the opening.

Accordingly, Bardin fails to teach or suggest that the folding portion (23) changes an area of the dispensing opening at least twice during dispensing of the beverage, and Bardin even teaches away from this feature. Consequently, Bardin does not disclose or suggest all of the features recited in amended independent Claim 7.

As Bardin teaches away from the above-noted features of Claim 7, no reasonable combination of Bardin and Fond would include all the features of Claim 7.

Amended independent Claim 12 recites substantially similar features to those discussed above for Claim 7 and patentably distinguishes over any proper combination of the cited references for at least the same reasons amended Claim 7 does.

Newly added independent **Claim 26**, which does not incorporate "means-plus-function" terminology, recites substantially similar features to those discussed above regarding amended independent Claim 7 and patentably distinguishes over any reasonable combination of Bardin and Fond for at least the same reasons as amended independent Claim 7 does.

All of the remaining active claims depend, directly or indirectly, from one of amended independent Claims 7 and 12 and patentably distinguish over any reasonable combination of the cited references for at least the same reasons as amended independent Claim 7 and 12 do.

Consequently, in light of the above discussion and in view of the present amendment, Applicants respectfully submit that the present application is in condition for allowance. An early and favorable action to that effect is respectfully requested.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Scott A. McKeown', is written over a horizontal line.

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